FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

February 21, 2001

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE TIMOTHY PATRICK INKSTER and LORRAINE CLAIRE INKSTER, formerly known as Lorraine Claire Whiting, Debtors.	BAP No. WO-00-063
OU FEDERAL CREDIT UNION, Appellant, v. TIMOTHY PATRICK INKSTER and LORRAINE CLAIRE INKSTER, Appellees.	Bankr. No. 00-12923 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before PUSATERI, BOULDEN, and KRIEGER, Bankruptcy Judges.

BOULDEN, Bankruptcy Judge.

After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered submitted without oral argument.

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* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

OU Federal Credit Union (OU) appeals an order of the United States Bankruptcy Court for the Western District of Oklahoma that vacated a prior extension order and denied a motion for enlargement of the time within which OU could object to discharge pursuant to 11 U.S.C. § 523(a).[1] For the reasons set forth below, the order of the bankruptcy court is AFFIRMED.

I. Background

OU asserts that on January 14, 2000, it granted to one of the Debtors an unsecured line of credit in the amount of $3,000. Approximately three months later, on April 17, 2000, the Debtors filed a Chapter 7 petition.

It is uncontested that the deadline for filing a § 523(a) complaint against the Debtors was July 24, 2000. On July 21, 2000, three days prior to the expiration of that deadline, OU filed a motion seeking an additional forty-five days in which to file a § 523(a) complaint (Extension Motion). OU stated that it "may have a claim" against the Debtors because they filed their Chapter 7 petition approximately ninety-three days after OU extended credit, but that it wanted to discuss the matter with the Debtors and possibly conduct discovery prior to filing a complaint. *Appellant's Appendix* at 0. It further alleged that its telephone calls to the Debtors' attorney seeking to discuss its possible claim went unanswered. *Id.*

The Debtors filed an objection to OU's Extension Motion on August 7, 2000 (Objection), arguing that "cause" to grant an extension of time to OU did not exist. *See* Fed. R. Bankr. P. 4007(c). The Objection asserted that OU was informed by the Debtors of their intent to file prior to filing, that OU received notice of the Chapter 7 case but did not attend the meeting of creditors, and that OU did not timely conduct discovery of its purported claim. The Debtors also argued that OU had cited no authority for the assertion that incurring a debt

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[1] All future statutory references are to title 11 of the United States Code.

ninety-three days prior to the filing of a Chapter 7 petition would give rise to an exception to discharge. *Appellant's Appendix* at 2-3. The Objection was served on OU by mail on August 7, 2000. *Id.* at 4.[2]

Being unaware of the Debtors' Objection, the bankruptcy court granted the Extension Motion by order dated August 14, 2000, and allowed OU until September 8, 2000 to file a § 523(a) complaint, stating that "good cause" was shown (Initial Order). *Id.* at 5. It does not appear as if the Initial Order was entered after a hearing, and there is no mention therein of the Objection.

Sometime after the Initial Order was executed, the bankruptcy court, apparently realizing that it had overlooked the Objection, scheduled a hearing on the Extension Motion. At a non-evidentiary hearing the bankruptcy court orally vacated its Initial Order, denied OU's Extension Motion, and ordered the Debtors to submit a proposed order within five days. On or about September 11, 2000, the bankruptcy court entered an order memorializing its bench ruling (Final Order). OU timely filed a notice of appeal from the Final Order.

II. Discussion

We have jurisdiction over this appeal. The order from which OU appeals is final for purposes of appeal, and the parties have consented to this Court's jurisdiction by failing to elect to have the appeal heard by the United States District Court for the Western District of Oklahoma. 28 U.S.C. § 158(a)(1) &

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[2] OU states that it was not served with the Objection in spite of the certificate of service stating that the Objection was served that same day by mail on OU's counsel. *Appellant's Brief* at 2. The Objection and certificate of service supplied by OU is unsigned. *Appellant's Appendix* at 2-4. We issued an Order directing the bankruptcy court to supplement our record with a copy of the pleading in its file, and that document reflects that the Objection was signed by Debtors' counsel. Based on this record, we presume that the Objection was served on OU.

Furthermore, we question OU's allegation of lack of service. It is difficult for us to understand how OU could have obtained an unsigned Objection other than by service by the Debtors, since the pleading contained in the bankruptcy court's file was signed.

(c)(1); Fed. R. Bankr. P. 8001-8002; 10th Cir. BAP L.R. 8001-1; *see Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (order is final if it " 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' ") (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

According to OU, the "sole issue" is whether the bankruptcy court "properly exercised its discretion" in denying OU's Extension Motion. *Appellant's Brief* at 1.[3] We agree with OU that this issue is reviewed for abuse of discretion. *See, e.g., Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 398 (1993) (extension of time based on excusable neglect under Fed. R. Bankr. P. 9006(b)(1) is reviewed for abuse of discretion); *In re Kirkland*, 86 F.3d 172, 174 (10th Cir. 1996) (dismissal of a complaint for failure to timely serve under Fed. R. Civ. P. 4(j), which includes a "good cause" standard, is reviewed for abuse of discretion); *Centric Corp. v. Trustees of the Centennial State Carpenters Pension Trust Fund (In re Centric Corp.)*, 901 F.2d 1514,1517 (10th Cir. 1990) (ruling on a Fed. R. Bankr. P. 9006(b)(1) motion is reviewed for abuse of discretion). Under this standard of review, " 'a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.' " *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991) (further quotation omitted)).

The Final Order does not contain any findings of fact or conclusions of law,

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[3] By this statement and the contents of its Brief, we assume that OU concedes that the bankruptcy court did not abuse its discretion in reconsidering the Initial Order in light of the Objection. *See, e.g., State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994) (issue is waived if not raised in opening brief); *see also Elsken v. Network Multi-Family Sec. Corp.*, 49 F.3d 1470, 1476 (10th Cir. 1995) (reconsideration of order is reviewed for abuse of discretion).

but rather it is a summary of the bankruptcy court's oral ruling at the hearing on the Extension Motion. We do not know what findings or conclusions the bankruptcy court made at that hearing because OU has not provided us with a transcript as required under Fed. R. Bankr. P. 8006 and 8009(b), and 10th Cir. BAP L.R. 8006-1(c) and 8009-1(a). Without a transcript, we have an inadequate record, giving us grounds to summarily affirm the bankruptcy court. *See, e.g.*, *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1237 n.15 (10th Cir. 1999) (appellant's failure to provide record is grounds for affirmance); *accord Lopez v. Long (In re Long)*, 255 B.R. 241, 245 (10th Cir. BAP 2000). But, even were we to exercise our discretion to review this appeal on the poor record before us, we conclude that the bankruptcy court did not abuse its discretion by denying OU's Extension Motion. *Tuloil, Inc. v. Shahid (In re Shahid)*, 254 B.R. 40, 43 (10th Cir. BAP 2000) (court may exercise discretion to consider the merits of appeal in spite of inadequate appendix).

OU contends that if it were to file a complaint, it would allege a cause of action under § 523(a)(2). Section 523(c) provides that:

> [T]he debtor shall be discharged from a debt of a kind specified in paragraph (2) . . . of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2) . . . of subsection (a) of this section.

11 U.S.C. § 523(c)(1). Federal Rule of Bankruptcy Procedure 4007 implements § 523(c), providing:

> (c) **Time for Filing Complaint Under § 523(c) in a Chapter 7 Liquidation . . . Case; Notice of Time Fixed.** A complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

Fed. R. Bankr. P. 4007(c). Federal Rule of Bankruptcy Procedure 9006 also provides that "[t]he court may enlarge the time for taking an action under Rule[] . . . 4007(c) . . . only to the extent and under the conditions stated in [that] rule[]." *Id.* at 9006(b)(3).

The deadline in Rule 4007(c) is strictly construed. *In re Themy*, 6 F.3d 688, 689 (10th Cir. 1993). Furthermore, "cause" for extending the Rule 4007(c) deadline is narrowly interpreted, and more flexible "excusable neglect" standards do not apply. *See Jones v. Arross*, 9 F.3d 79, 81 (10th Cir. 1993) (citing *In re Grey*, 156 B.R. 707, 710 (Bankr. D. Me. 1993)); *see also Kirkland*, 86 F.3d at 174-75 ("good cause" for failing to timely serve complaint under Fed. R. Civ. P. 4(j) is interpreted narrowly, and inadvertence or neglect are not good cause); *State Guaranty Bank v. Ensminger (In re Ensminger)*, 42 B.R. 548, 551 (Bankr. W.D. Okla. 1984) (motion to extend time under Rule 4007(c) must be timely filed, and enlargement of time for excusable neglect is not permitted); *cf. Aspect Tech. v. Simpson (In re Simpson)*, 215 B.R. 885, 886-87 (10th Cir. BAP 1998) (per curiam) (excusable neglect standard not applicable to motion to extend time to file a notice of appeal where extension is governed by Rule 8002, not Rule 9006).

The pleadings in the record, the contents of which are not disputed by OU, show that OU had notice of the Debtors' Chapter 7 case and the Rule 4007(c) deadline to file a nondischargeability complaint, but it failed to conduct any discovery related to its purported claim. The Debtors' § 341 meeting of creditors was timely conducted, and OU failed to appear. Finally, OU's claim, if any, involves only one of the Debtors and a simple $3,000 debt, and we are unclear as to the basis that OU would assert to allege the debt was nondischargeable. Under these facts, the bankruptcy court's refusal to extend the Rule 4007 deadline was not a clear error of judgment.

In so holding, we have considered cases decided by the bankruptcy court

prior to the Tenth Circuit cases mentioned above, that facially apply a more liberal interpretation of "cause" under Rule 4007(c). In *In re Kellogg*, 41 B.R. 836, 838 (Bankr. W.D. Okla. 1984), the bankruptcy court granted a creditor an extension of time to file a § 523(a) complaint, summarily stating that such motions "should be granted liberally absent a clear showing of bad faith . . . ." Later, in *Chase Manhattan Bank, N.A. v. Sturgis (In re Sturgis)*, 46 B.R. 360, 364-65 (Bankr. W.D. Okla. 1985), the bankruptcy court granted an extension after considering potential prejudice to the debtor and any adverse impact on the court's administration of the debtor's case. Finally, in *In re Linn*, 88 B.R. 365, 366 (Bankr. W.D. Okla. 1988), the bankruptcy court summarily stated that "cause" existed for an extension of the deadline in Rule 4007(c) due to discovery delays that it had imposed. *But see In re Schones*, 42 B.R. 552, 553 (Bankr. W.D. Okla. 1984) (refusing to treat a motion for relief from stay as a timely motion to extend the Rule 4007(c) deadline, the court notes that Rule 4007(c) is "harsh" and that its deadlines may only be extended as allowed therein).

Even assuming that these cases are read to liberally allow extensions and that they survive in light of more recent Tenth Circuit law interpreting "cause" for granting an extension of time to comply with a deadline, their facts are distinguishable from those in this case. In *Linn*, the court had imposed discovery deadlines that made the filing of a timely complaint impossible. *Kellogg* and *Sturgis* were complex cases, and in *Sturgis*, the movant had engaged in substantial examination of the debtor, but needed more time to clarify its position due to the complexity of the case. Such facts would likely be cause for an extension of time even under the strict Tenth Circuit standard.

Here, in contrast, OU knew that the Debtors had filed a Chapter 7 petition, believed that it may have a § 523(a) claim, and had notice of the Rule 4007(c) deadline. The Debtors did not delay or impede the administration of their case by their actions. *Appellant's Appendix* at 3. No restrictions on discovery appear to

have been imposed by the court, and OU's alleged claim was not so complex as to require extensive discovery. Rather, OU simply failed to conduct any discovery at all. Based on these facts, the bankruptcy court was well within its discretion in denying OU's Extension Motion.

III. Conclusion

For the reasons stated, the order of the bankruptcy court is AFFIRMED.